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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-1206

WOLFSON, WEINER, RATOFF & LAPIN AND WOLFSON, WEINER & CO.,

Petitioners,

vs.

THE HONORABLE MALCOLM M. LUCAS, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, AND ALL PLAINTIFFS IN IN RE EQUITY FUNDING CORPORATION OF AMERICA SECURITIES LITIGATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ABELES & MARKOWITZ
NATHAN MARKOWITZ
JUDITH A. GILBERT
GERRY L. ENSLEY
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PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioners Julian Weiner, Solomon Block, and Marvin A. Lichtig respectively pray that a Writ of Certiorari issue to review the denial by the United States Court of Appeals for the Ninth Circuit of a Motion for Stay and petition for Writ of Mandamus of the Taking of Simultaneous Depositions in In Re Equity Funding Corporation of America Securities Litigation, M.D.L. Docket No. 142, in the Central District of California, Ninth Circuit No. 7535-71.

CITATIONS TO OPINIONS BELOW

The Order of the Court of Appeals is attached hereto as Appendix A. No formal opinion was rendered by that court. The order of the United States District Court for the Central District of California is not reported nor was an opinion rendered.

JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit was entered on November 25, 1975. This petition is filed within 90 days thereof. 28 U.S.C. § 2101(c). The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the pretrial ordering of a deposition schedule for so narrow an expanse of time as to force upon the parties the necessity of attending simultaneous depositions, i.e. depositions of major witnesses occurring at the same time and at different locations and which order expressly authorizes simultaneous depositions, distorts the clear intent of Rule 26(d), Federal Rules of Civil Procedure, prevents meaningful discovery, fair trial, adequate representation, and constitutes patent abuse of discretion.

STATUTORY PROVISION INVOLVED

Rule 26(d), Federal Rules of Civil Procedure:

> "Sequence and timing of discovery. Unless the court upon motion, for the convenience of the parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery."

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STATEMENT OF THE CASE

On October 15, 1975, Judge Malcolm M. Lucas of the United States District Court for the Central District of California issued Discovery Order No. 2 ("Order") which formed the basis of the Motion for Stay Writ of Mandamus in the Ninth Circuit below, a correct copy of which was attached to that petition below (Exhibit 12 therein). The Order established a schedule for the taking of depositions in the matter of "In re Equity Funding Corporation of America Securities Litigation, M.D.L. Docket No. 142" ("EFCA Litigation") in part as follows:

> "In order to avoid unnecessary delay in the discovery and to allow prompt and just resolution of the claims made in this litigation, the Court will allow *and require concurrent depositions* pursuant to *Fed.R.Civ.Pro.* 26 (d). These concurrent depositions will be necessary to complete discovery by the October 1, 1976 cut-off date, but the parties should make all reasonable attempts to *minimize the overlapping of the depositions of key witnesses* in this litigation.
>
> The depositions . . . shall be taken commencing on the dates set forth or determined as provided below, *unless otherwise agreed to by counsel present at the particular deposition.*
>
> . . . It is contemplated that pursuant to the above schedule *more than one deposition* may take place *simultaneously* at different locations.
>
> . . . The completion of the deposition . . . of any of the . . . parties or witnesses is *not* a condition precedent to the commencement of the deposition of any other party or witness . . . ."

"Order," p.2, line 11-23; p.8, lines 11-13, 1-4, emphasis added.

A "Motion to Reconsider" the ordered deposition schedule and to certify the question for appeal pursuant to 28 U.S.C. § 1292(b) was filed November 7, 1975, and was denied.

The "Motion for Stay of the Taking of Simultaneous Depositions" and petition for Writ of Mandamus were filed in the U.S. Court of Appeals for the Ninth Circuit in November, 1975, and denied November 25, 1975. A correct copy of that written denial is appended herewith as Appendix A and incorporated by this reference.

Concurrent depositions, many of them necessarily simultaneous, and all pursuant to "Discovery Order No. 2" continue unabated.

STATEMENT OF FACTS

"Discovery Order No. 2" ("Order") establishes concurrent depositions (in excess of 144 deponents requested by plaintiffs alone) to be taken between November 3, 1975 and August 2, 1976, a period of only 150 working days. The order expressly provides for "overlapping" and "simultaneous" depositions.

Simultaneous depositions have been scheduled pursuant to the "Order" often requiring counsel to attend three or more separate places in the same city on the same day and often three or more separate cities (e.g. Los Angeles, Chicago, and New York) on the same day. *cf.* affidavits of Nathan Markowitz and Richard DeSantis, appended herewith as Appendices B & C respectively and incorporated by this reference; *cf.* also the joint-affidavit of Harold A. Abeles and Nathan Markowitz (Exhibit 20) below. The prejudice is no longer speculative. Because of past occurrences, and if simultaneous depositions continue to occur, and each day such continues, petitioners will suffer and have suffered irreparable injury in that they have been denied adequate

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representation through no fault of counsel and solely by virtue of the District Court's Order establishing simultaneous depositions, which Order is an abuse of the discretion granted by *Fed. R. Civ. Pro.* 26(d).

The instant actions grew out of the so-called Equity Funding Securities Fraud, a procedural summary of which is summarized at pp. 14-16 of the motion petition below. Suffice it to say that the instant actions constitute a consolidation of in excess of 100 actions involving millions of shares of stock of Equity Funding Corporation of America and its subsidiaries in which petitioners' liability is hotly contested and in which defense discovery is extremely important.

The actions were filed March, 1973, were transferred to the multi-district docket December 11, 1973, were stayed December 20, 1973, were consolidated and refiled October 15, 1974, with very limited discovery beginning November 19, 1974 by depositions of only named deponents and all other depositions being stayed, and plenary deposition discovery commencing October 15, 1975 pursuant essentially to the adoption of plaintiffs' discovery schedule. The schedule, in effect, allows plaintiffs to conduct their discovery between November 3, 1975 and August 2, 1976, a period of nine months, leaving defendants the period August 2, 1976 to September 30, 1976, a period of two months, to conduct their discovery. The "concurrent" Order legally allows defense discovery prior to August, 1976, but, of course, Plaintiffs' court-ordered schedule practically and effectively precludes it.

Reference is also made (from Mr. Ritchie's affidavit [Exhibit 21] below) that pursuant to stay orders extant until 1975, defendants were not allowed access to information accumulated and residing in the Trustee's Depositories until October 15, 1975. Defense counsel were then for the first time allowed to view the 9 rooms (one the size of a

"gymnasium") filled with voluminous corporate records of Equity Funding Corp. and its subsidiaries and principals involved. The *index* to the boxes of documents stored in the 9 depositories measured 9¼" in height. *cf.* the Chapter Ten Proceeding of "In re Equity Funding Corporation of America," Central District of California No. 73-03467. It needs no elaboration that meaningful representation of clients cannot occur at depositions where access to documentary information has been until very recently curtailed.

REASONS FOR GRANTING THE WRIT

1. Any requirement of simultaneous depositions is inherently prejudicial and incapacitates counsel from adequately representing their client defendants.

2. Simultaneous depositions preclude effective defense preparation and deny petitioners as parties the right to a fair trial.

3. The requirement of simultaneous depositions is inherently abusive and in violation of Rule 26(d), Federal Rules of Civil Procedure.

4. The ordered schedule is unfair and unworkable.

DISCUSSION

The crucial issue is whether the Court can force civil defendants to hire a battery of lawyers so that counsel can be present at conflicting and simultaneously scheduled depositions, when the problem of simultaneity could be avoided simply by extending the deposition schedule. All discovery is expressly required to be concluded by October 1, 1976.

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ARGUMENT

I

IT IS PHYSICALLY IMPOSSIBLE TO ACCOMMODATE THE COURT-ORDERED DEPOSITION SCHEDULE WITHOUT HAVING SIMULTANEOUS DEPOSITIONS.

It is a matter of record herein that many occasions of simultaneous deposition have already occurred, will continue to occur, and were expressly contemplated by the Court below. That such an occurrence is inherently prejudicial to a party employing counsel who is a sole practitioner or two or three-member law firm cannot have escaped the Court's notice. By affidavits appended herewith Petitioners have shown how current deposition practice is occurring pursuant to the ordered schedule. Those are not isolated instances. Nor does the "Order" contemplate the scheduling of "second bite" depositions betwixt initial deposition dates ordered by the Schedule. The existence of "second bite" depositions increases simultaneity already extant because of the rapid scheduling of initial depositions.

While it was clearly within the Court's power to schedule depositions so as to avoid the problem of simultaneity, it has declined to do so and has drafted the Order expressly incorporating simultaneity.

II

IN ALLOWING "CONCURRENT" DISCOVERY, RULE 26(d) IN NO WISE INTENDED TO AUTHORIZE THE SIMULTANEOUS TAKING OF DEPOSITIONS.

The new addition of Rule 26(d) was intended to abrogate the "priority rule" and its attendant evils. 48 F.R.D. 487, 506. It was not intended to force or allow the taking of simultaneous depositions:

> "In practice, the depositions are not usually taken simultaneously. . . . One party may take a complete

> deposition and then the other, or, if the depositions are extensive, one party deposes for a set time, and then the other."
>
> *Id.* at 507.

Citing *Caldwell-Clements, Inc. v. McGraw-Hill Pub. Co.*, 11 F.R.D. 156 (S.D.N.Y. 1951), the Rules commentators clearly intended that none

> ". . . of the litigants should be *rendered sterile* with the necessary *preparation of its case* while the other party is conducting its examination . . . ."
>
> *Caldwell-Clements, supra*, at 158 (emphasis added).

What everyone has failed to consider — and this no doubt accounts for the near absence of authority on this issue — is that the requirement of simultaneous depositions appears to be harmless but in fact is much more "sterilizing", debilitating to case preparation than was the nefarious "priority rule." The "priority rule" [now abrogated by Rule 26(d)] merely *delayed* the taking of depositions. Simultaneity *forbids entirely* the taking of selected depositions because of the physical impossibility of being two places at once. Failure to attend a duly noticed multi-party deposition constitutes a *waiver* thereof for non-examining parties. If "waiver" is the intentional relinquishment of a known right (*Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L.Ed. 1461, 58 S.Ct. 1019 [1938]), then no "waiver" of discovery ought to be attributed to the failure of counsel to attend selected depositions where the selection is forced upon counsel by the court. There is no authority in Rule 26(d) or anywhere to allow a trial court to force the dilemma of electing which depositions counsel must forego because of a totally impractical deposition schedule. The very essence of Rule 26(d) is precisely the opposite: no party is to be "rendered sterile" in case preparation while the other party is examining. The instant discovery order injects the very "sterility" Rule 26(d) was designed to prevent.

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In *Mims v. Central Mfrs. Mut. Ins. Co.*, 178 F.2d 56 (5th Cir. 1949) the court held that

> ". . . notices given as set forth above calling, as they did, for the taking of depositions of numerous witnesses on the same date, in scattered localities across the continent, were [not] in any sense reasonable. . . . [T]he depositions should not have been admitted for any purpose."
>
> *Mims, supra*, at 59.

The primary purpose in giving notice of a deposition is to inform

> ". . . [a]n opposing party . . . that he be available to confront his opponent's witnesses . . . in order that the opposing party might have the opportunity to confront them with preparation as to character, credibility, and qualification."
>
> *Piel v. Falkner*, 426 F.2d 412, (C.C.P.A. 1970).

Simultaneous scheduling *ipso facto* prevents confrontation.

In light of the recency of the new Rules' amendments, and total absence of authoritative guidelines for Rule 26(d), petitioners urge this court definitively to proscribe for all time the imposition of simultaneous depositions by any federal trial court.

III

REQUIRING SIMULTANEOUS DEPOSITIONS IMPAIRS ADEQUATE REPRESENTATION OF PARTIES AND PREVENTS FAIR TRIAL.

> "[I]t was never intended . . . that a party might be able to compel his adversary, perhaps at enormous cost, to retain and fully instruct separate counsel in a dozen separate cities. Moreover, *his personal presence*

might well be necessary to secure, by suggestions to his counsel, such proper cross-examination as would prevent a failure of justice. Nor could he . . . determine, in advance of the direct examination, in which one of a dozen different places his personal attendance might be most required. . . . Such a practice should not be sanctioned by the court; it would be unreasonable and grossly oppressive."

Uhle v. Burnham, 44 F. 729, 730-731 (C.C.S.D.N.Y., 1890), emphasis added.

It is the right of each party to participate in discovery and to be present at depositions. 4 *Moore's Federal Practice*, ¶ 26.52 (2nd ed., 1975). Many of the instant parties have retained sole practitioners or small law firms to represent them herein. *cf.* Appendix C herewith. A simultaneous deposition schedule is inherently abusive in requiring representation by large law firms whose personnel and resources are large enough to accommodate sending four or five associates to separate locations on the same day. Petitioner Block, whose estate is currently in a bankruptcy proceeding, has no resources to retain a hundred-member law firm. But financial resources aside, it is unfair to require simultaneity where information gained during one simultaneous deposition could not become immediately available for use in confronting other simultaneous deponents. Confrontation is essential to the deposition. *Piel v. Falkner, supra.*

"A set rule limiting the time within which pretrial discovery may be had may be appropriate for routine cases. . . . The exceptional case requires different treatment, however, and the spirit of the rules does not require that completeness in the exposure of the issues in the pretrial discovery proceedings be sacrificed to speed in reaching the ultimate trial on the merits. Delay should be avoided . . . but *adequate time must be*

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> *allowed* for discovery of the facts and assembly of the proof."
>
> *Freehill v. Lewis*, 355 F.2d 46, 48 (4th Cir. 1966), emphasis added.

The instant case is hardly "routine." Indeed, it meets virtually all of the seven criteria for "non-routine" cases — extensive pretrial, complex proof, multiple parties, large stakes, sensational aspects, public questions, multiplicity of actions — *cf.* Kendig, "Procedures for Management of Non-Routine Cases," 3 *Hofstra L. Rev.* 701, 703 (1975).

How is it fair to allow plaintiffs plenary access to deposition discovery while denying the same to defendants? The unfairness is patent:

> "The party taking [plaintiffs, until August 2, 1976] such simultaneous depositions would not necessarily experience the same embarrassment, for, by means of carefully prepared written questions, he might safely intrust the examination to clerks, or even the officer taking the depositions. Such a practice should not be sanctioned by the court; it would be unreasonable, and grossly oppressive. Whoever seeks to avail of the provisions of Section 863 [now Rules 26 and 30] must so regulate his notice that the *opposite party and his counsel may be able to attend*, at the place and time named, *entirely unhampered by other engagements which he himself has imposed upon them.*"
>
> *Uhle v. Burnham*, *supra*, at 731, emphasis added.

If the "personal presence" of a party at the deposition be necessary "to prevent a failure of justice", (*Uhle*, *supra*), simultaneous scheduling, which *carte blanche* denies the party's personal presence, constitutes *ab initio* a failure of justice. Nor can it be argued that some deponents are not so important as to warrant the personal presence of the party or counsel. Neither the party nor counsel can

> " . . . determine, in advance of the direct examination, in which one of a dozen different places his personal attendance might be most required."
>
> *Uhle, supra,* at 731.

The instant Order by requiring simultaneity insures a failure of justice by insuring non-attendance of defendants and/or their counsel at critical depositions. *cf.* Appendices B and C herein.

At a minimum due process contemplates the fairness of equal opportunity to prepare for trial.

> "The present concept of due process stems from our American ideal of fairness in the treatment of all."
>
> *Howard v. United States,* 372 F.2d 294, 301 (9th Cir. 1967)

Adequacy of representation by counsel demands adequate opportunity to prepare for trial.

> "... [W]e cannot minimize the fact that effective assistance [of counsel] refers not only to forensic skills but the painstaking investigation in preparation for trial."
>
> *Wolfs v. Britton,* 509 F.2d 304, 309 (8th Cir. 1975).

Multiple simultaneous depositions are so onerous and blatantly unfair as to make a sham of the fundamental purpose of discovery, vitiate adequacy of representation by counsel, deny equal opportunity to prepare for trial, and thereby deny due process and fair trial. They likewise abridge "Fifth Amendment equal protection" in creating a procedure commanding the use of multiple representation by counsel where there is no justification for creating such. Cf. *Johnson v. Robinson,* 415 U.S. 361, 364 n.4, 39 L.Ed. 2d 389, 94 S.Ct. 1160, 1164 (1974).

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CONCLUSION

For the foregoing reasons a writ of certiorari must issue from this Court to reverse the order of the Court of Appeals for the Ninth Circuit and immediately stop the unconscionable and abusive "Discovery Order No. 2," which commands the taking of simultaneous depositions.

Respectfully submitted,
ABELES & MARKOWITZ
NATHAN MARKOWITZ
JUDITH A. GILBERT
GERRY L. ENSLEY

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RICHARD A. DESANTIS
Attorney for Petitioner Marvin A. Lichtig

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In Re Equity Funding Corporation of America Litigation MDL-142-MML.

Wolfson, Weiner, Ratoff & Lapin and Wolfson, Weiner & Co.,

Petitioners

vs.

United States District Court for The Central District of California,

Respondent

Anne Oringer, et al.,

Real Parties in Interest.

FILED
NOV. 25, 1975
EMIL E. MELFI, JR.
CLERK
U. S. COURT OF APPEALS

No. 75-3571
ORDER

Before: Browning and Koelsch, Circuit Judges

Upon due consideration, the emergency motion for stay is denied.

Koelsch

Browning
U.S. Circuit Judges

APPENDIX A

BLEED THROUGH

AFFIDAVIT OF NATHAN MARKOWITZ

Nathan Markowitz, being duly sworn, deposes and says:

I am a partner of the law firm of Abeles & Markowitz; until January, 1976 the firm consisted of two partners and three associates; primarily because of the Equity Funding matter, especially the discovery order contemplating simultaneous depositions, I hired two additional lawyers who are now associated with the firm.

My firm represents two separate defendants named in "In re Equity Funding Corporation of America, Securities Litigation, M.D.L. Docket No. 142," namely Julian Weiner and Solomon Block.

I opposed the discovery Schedule set forth in Discovery Order No. 2 filed October 15, 1975 by The Honorable Malcolm M. Lucas, Judge of the United States District Court, inasmuch as the schedule contemplated the taking of scores of depositions "concurrently" and *simultaneously*. While pretrial discovery ought to proceed as rapidly as justice and fairness permits, I must recoil from the excessive and abusive present deposition schedule which necessitates the taking of *simultaneous* depositions of major witnesses in this litigation.

I opposed Discovery Order No. 2 on the basis that it is unfair and incapacitating to adequate trial preparation to be forced to forego attending someone's deposition because counsel must be elsewhere taking another deposition in the same matter.

I joined with Mr. Ritchie's "Motion to Reconsider" (Exhibit 13 below) the deposition schedule for the grounds therein stated.

The existence of simultaneous depositions has occurred many times pursuant to Discovery Order No. 2 and continues unabated.

APPENDIX B

As evidence of the impossibility of adequately preparing the defenses of my clients in the instant matter I cite the following (taken from my office calendar) as typical (but in no sense exhaustive) examples requiring simultaneous attendance at different places:

DATE	DEPONENT	PLACE
Jan. 8, 1976	Strand & Co.	N.Y. City, N.Y.
Jan. 8, 1976	N.Y. Securities	N.Y. City, N.Y.
Jan. 8, 1976	William Wolback	Boston, Mass.
Jan. 8, 1976	Martin Lipton	N.Y. City, N.Y.
Jan. 8, 1976	Harold Richards*	Richmond, Va.
Jan. 9, 1976	Jerome Factor	Chicago, Ill.
Jan. 9, 1976	Harold Richards*	Richmond, Va.
Jan. 9, 1976	N.Y. Securities	N.Y. City, N.Y.
Jan. 12, 1976	Ohio Teachers Bd.	Columbus, Ohio
Jan. 12, 1976	Dishy Easton	N.Y. City, N.Y.
Jan. 12, 1976	N.Y. Securities	N.Y. City, N.Y.
Jan. 12, 1976	Elaine Berlin	N.Y. City, N.Y.
Jan. 15, 1976	Herbert Glaser	Los Angeles, Calif.
Jan. 15, 1976	N.Y. Securities	N.Y. City, N.Y.
Jan. 15, 1976	Dishy Easton	N.Y. City, N.Y.
Jan. 15, 1976	David Baker	Boston, Mass.
Feb. 2, 1976	Robert Spencer	Los Angeles, Calif.
Feb. 2, 1976	Martin Kugler	Los Angeles, Calif.
Feb. 2, 1976	Lee Smith	N.Y. City, N.Y.
Feb. 4, 1976	Robert Spencer	Los Angeles, Calif.
Feb. 4, 1976	Frank West	Los Angeles, Calif.
Feb. 4, 1976	William Brown	N.Y. City, N.Y.
Feb. 5, 1976	Stanley Beyer	Los Angeles, Calif.
Feb. 5, 1976	Daniel Fuss	Boston, Mass.
Feb. 5, 1976	Marshall Lebow	Los Angeles, Calif.
Feb. 5, 1976	Preston Tisch	N.Y. City, N.Y.

* Rescheduled without notice to any defendants upon ex parte motion of Plaintiffs' counsel.

APPENDIX B

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Because of the foregoing schedule my firm (even with my present augmented staff of lawyers) was forced to forego attending many of the foregoing depositions.

The foregoing examples indicate the abusive nature of the present deposition schedule which is aggravated by Discovery Order No. 2's provision for the altering, without notice to absent parties, of the deposition schedule by the mere concurrence of parties *present* at any particular deposition. (Discovery Order No. 2, p. 2, lines 11-23.) Such provision makes attendance mandatory to avoid the prejudice of increased re-scheduling. By foregoing attendance at a deposition a party has not only failed to represent his client adequately and prepare the matter for trial, but has also, lost the opportunity to choose later deposition scheduling to avoid the increasing simultaneity.

NATHAN MARKOWITZ

Sworn before me this 16th day of February, 1976, at Beverly Hills, California.

Subscribed and Sworn
to before me this 16th
day of February, 1976.

STEVEN J. REVITZ

Notary Public in and for said County and State

OFFICIAL SEAL
STEVEN J. REVITZ
NOTARY PUBLIC – CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires Nov. 16, 1979

APPENDIX B

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STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.

I, RICHARD A. DeSANTIS, being duly sworn, say:

I am a member of the State Bar of the State of California and I have been the attorney for Marvin A. Lichtig since 1973.

Despite my objection to Discovery Order No. 2, Judge Lucas set a schedule of depositions in this case permitting three simultaneous depositions or more to be taken in a single day; such schedule also orders such depositions to be taken, and some of said depositions were to be taken in New York or other states at the same time that depositions were scheduled in Los Angeles. When I made my objection to the Order in November 1975, I had one other attorney employed by me. I now have two attorneys employed by me; it has been both a financial burden and an impossible task to attempt to maintain any semblance of an organized search for information in order to protect my client. The many thousands, or even millions, of documents which must be reviewed by an attorney knowledgeable in this case to understand the complexities of both the plaintiff and defense positions make it totally impossible to review the documents and to attend the depositions at the same time. Despite the fact that I have been working an average of twelve to sixteen hours per day on this case, I am unable to keep up. Mr. Lichtig is a defendant in the M.D.L. actions as follows:

1. M.D.L. Docket No. 142, in the matter of *Equity Funding Corporation of America Securities Litigation;* (M.D.L. 142)

2. *Loeffler v. Riordan, Getty, Goldblum, et al.*, CV-75-1122 MML which is to come to trial in May 1976. (M.D.L. 142)

3. In re Equity Funding Corp. Bankruptcy Reorganization proceedings, (No. 73-03467 HP).

The attorneys for plaintiff Loeffler have set a deposition schedule so that their depositions are taken simultaneously with those of the class action plaintiffs in the M.D.L. Securities Litigation. Had the Court not allowed such simultaneous scheduling, I would have attended all of the depositions so that the discovery would be fair to all parties.

My client is unable to expend the large sums for this litigation and as a small law office we do not have the personnel to attend five or six depositions simultaneously in one day. The plaintiffs' committees have as many attorneys as they need because they are a series of large firms and they have divided up the effort, since they represent for all practical purposes, a single client, the representative plaintiffs in a class action. I know my client has been prejudiced by these procedures and I suggest that they do not meet the standards of fair play and equal justice. Since I have been representing Mr. Lichtig since 1973, I am aware of all of the facts relating to his matter; it would have been a tremendous task and inordinately expensive to have changed lawyers at any time. I have spent thousands of hours from 1973 to 1975 in such case.

In addition to the foregoing, it should be pointed out that frequently plaintiff's counsel have, without notice, changed the schedule of depositions without giving written notice to all parties but orally notifying those present at the deposition of the changes indicated. This has further compounded our problems, i.e., lack of notice and changed schedules.

On January 12, 1976, for example, the Ohio State Teachers Retirement Board's representative was deposed at the

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offices of Wright, Harlor, Morris and Arnold, Huntington Trust Building, 37 West Broad Street, Columbus, Ohio. At the same time, the deposition of Bernard Dishey, scheduled to commence on January 12, 1976, which was later changed to January 14, 1976, went on from January 14, 1976 over through January 22nd. On January 13, 1976, the representative of the Oppenheimer Time Fund was being deposed at Debevoise, Plimpton, Lyons & Gates, 299 Park Avenue, New York, and the deposition of Donald Kramer was being taken at Curtis, Mallet-Prevost, Colt & Mosle, 100 Wall Street, New York. At the same time, the deposition of Jerome Evans, in the matter of *Loeffler v. Riordan, et al.*, was taken at Nossaman Waters, Krueger, Marsh & Riordan, 445 South Figueroa Avenue, 30th Floor, Los Angeles. In each instance, the depositions went on for several days; the Evans deposition went from January 12, 1976 for approximately five days; the Dishey-Easton deposition commenced actually on January 14, 1976, although scheduled for January 12, 1976, and went on for seven days; the deposition of Herbert Glaser began on January 15, 1976 at the offices of plaintiff's steering committee counsel, 3700 Wilshire Boulevard, Los Angeles and the deposition of David Baker of the Boston group, commenced on January 15, 1976 and January 16, 1976 at Wachtell, Lipton, Rosen & Katz, 299 Park Avenue, New York, while on January 19th through the 30th, representatives of Bache & Company and its accountants, Alexander Grant & Company, were being deposed from January 19th through 30th, 1976, at the offices of Kreindler & Kreindler, 99 Park Avenue, New York.

Moreover, the deposition of John W. Bristol of the Boston group commenced on January 21st and ran through January 23rd at 299 Park Avenue, New York. The undersigned was only able to appear at the deposition of the Dishey-Easton representatives. I attempted to have one

associate with me especially for the purpose to appear at one of the other depositions. This is a clear example of the problems encountered by counsel which he has been unable to overcome.

In addition, this Court should be aware that Judge Lucas has entered an order in the matter of *Loeffler v. Reardon, et al.*, which is also a part of the M.D.L. action that all discovery must be completed by March 5, 1976; that all pretrial memoranda must be completed by April 6, 1976; and that a final pretrial conference is to take place on April 28, 1976; and a trial date of May 11, 1976 is set in that action. This office has been unable to even commence its discovery process with respect to that action because of the number of depositions being taken simultaneously. In the case of *Loeffler v. Reardon, et al*, Case No. CV-74-2782, a part of the M.D.L. 142 series, the deposition of Jerome Evans commenced on January 12th and ran for approximately one week; the deposition of John Pennish commenced on January 27th and ran for approximately three days; the deposition of Charles Helfrick commenced on January 23rd and took approximately two to three days; and the deposition of Herbert Glazer commenced on February 10, 1976 and took approximately two days; and the depositions of Nelson Loud and Yuras Arkus-Duntov commenced in New York on February 9th and 10th, 1976, all at the same time as the other depositions were going on. This office, therefore, was unable to appear in the depositions of Helfrick, Pennish and Evans, except on one occasion when we were able to have an attorney present for one morning. I did not appear at the depositions of either Nelson Loud or Yuras Arkus-Duntov. It is significant that each of the aforesaid depositions were of former officers or directors of Equity Funding Corporation whose testimony might be very crucial to my client.

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Attached hereto is one of several schedules of depositions which is not now current because changes have been made since receiving it. The same is attached hereto and marked Exhibit "1" and made a part of this affidavit.

I respectfully suggest to this Court that the deposition schedule must be stayed in fairness to this defendant.

Executed at Los Angeles, California this 16th day of February, 1976.

Subscribed and Sworn
to before me this 16th
day of February, 1976.

RICHARD A. DESANTIS

STEVEN J. REVITZ

Notary Public in and for said County and State

OFFICIAL SEAL
STEVEN J. REVITZ
NOTARY PUBLIC – CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires Nov. 16, 1979

APPENDIX C

BLEED THROUGH

(All depositions scheduled are pursuant to Discovery Order No. 2 unless otherwise indicated)

Equity Funding Depositions

	Deponent	Date
(2)	William Seidman of Seidman & Seidman	November 3-7, 1975 (adjourned to January 8, 1976)
(1)	Robert Spencer of Seidman & Seidman	November 6, 1975 Changed to November 24, 1975 per Order dated 10/24/75 Second Bite February 2, 1976
(1)	Phillip Wolfson of Wolfson, Weiner, Ratoff & Lapin	November 12, 1975
(22)	Fred Levin	December 17, 1975 Changed to November 13, 1975 per Order dated 10/29/75 at Terminal Island
(1)	Lorin Wilson of Haskins & Sells	November 17, 1975
(1)	Michael Balint of Haskins & Sells	November 18-25, 1975 Continued to December 16, 1975
	James C. Smith	November 21, 1975 (per Order dated 10/29/75) Not going forward as yet (Smith transferred to Illinois for criminal proceedings)
(1)	Robert Spencer of Seidman & Seidman	November 24-26 & 28, 1975 Second bite February 2, 1976
(1)	John Templeton	November 24-26, 1975
(1)	G. Philip Streetfield of Penn Life	November 26 & 28, 1975 Second bite February 3, 1976
(1)	Daniel Disipio	November 28, 1975 Second bite February 10, 1976

APPENDIX C — EXHIBIT 1

	Deponent	Date
(7)	William Wolbach of Boston Company	December 1-2, 1975
(6)	Stein, Orphanos, Quinn, DeMartino and Valakis of The Dreyfus Fund	December 1-2, 1975 Continued to December 15 to & 23, 1975
(1)	Burton Borman of Penn Life	December 2, 1975 Continued to December 3, 1975
(1)	Burton Borman of Penn Life	December 3, 1975 Second Bite May 11, 1976
(1)	Stanley Beyer of Penn Life	December 5, 1975 Second Bite February 5, 1976
(8)	Allen Gorrelick	December 8, 1975 Taken by Salomon Bros. (per pls' notice dated 11-10-75) (Continued to January 26 to 28, 1976)
(3)	Alexander Grant & Co.	December 9, 1975 (Carr attending for NLM)
(1)	Joe D. Bain of Penn Life	December 10, 1975 Continued to December 11, 1975 Second Bite February 11, 1976
(1)	Joe D. Bain of Penn Life	December 11, 1975 Second Bite February 11, 1976
	Arthur Lewis	December 12, 1975 (Per Order Dated 10-20-75) Transferred to Illinois for Criminal Proceedings — To be Continued
(15)	William R. Salomon	December 15, 1975 (per letter dated 12-8-75)
(1)	Robert Karr of Penn Life	December 15, 1975
(6)	Stein, Orphanos, Quinn, DeMartino and Valakis of The Dreyfus Fund	December 15 to & 23, 1975

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	Deponent	Date
(9)	Anthony Colao of Coopers & Lybrand	December 15-16, 1975
(1)	Robert Tuttle of Penn Life	December 16, 1975
(1)	Michael Balint of Haskins & Sells	December 16, 1975 Second Bite February 24, 1976
(22)	Stanley Goldblum	December 17, 1975 (Per Order dated 10/29/75)
(9)	Vincent Serrechia of Coopers & Lybrand	December 16-17, 1975
(21)	William Suttle of Peat Marwick & Mitchell	December 17, 1975
(21)	Dale Dodge of Peat, Marwick & Mitchell	December 18, 1975
(13)	Seena Pukel	December 19, 1975
(21)	Marlin Wilson of Peat, Marwick & Mitchell and its Client Ranger Nat'l Life Ins. Co.	December 19, 1975 No Second Bite
(9)	William Burress of Coopers & Lybrand	December 19-20 & 22, 1975
(1)	Herbert Glaser	December 22, 1975 (Per Order dated 10/29/75) Continued to January 15, 1976
(11)	Lisadent, Inc.	December 22, 1975
(11)	Murray Gilbert	December 22, 1975
(12)	Dan's Supreme Supermarket, Inc.	December 22, 1975
	Representatives of Joseph Frogatt & Co.	December 22-31, 1975

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	Deponent	Date
(3)	Representatives of the New York Stock Exchange	December 22, 1975 (Carr appearing for NLM) Not Going Forward
	Guy Michaels	December 22, 1975
(9)	William O. Wilhelm & P.J. Miller of Coopers & Lybrand	December 23, 1975
(3)	Representatives of the American Stock Exchange	December 23, 1975 (Carr appearing for NLM) Not going forward
(13)	Morris Pukel (changed to Seena Pukel)	December 23, 1975 (advanced to December 19, 1975)
(12)	Nat Berens	December 23, 1975
(14)	Robert Selig	December 24, 1975
(1)	Robert Tookey & Gil Kerns of Milliman and Robertson, Inc.	December 26-31, 1975 (continued to December 29, 1975)
	Lloyd Edens	December 29, 1975 (Per Order dated 10/29/75) Not going forward since Edens was transferred to Ill. for criminal proceedings
(10)	M. I. Ginsberg, Roy V. Johnson, & Duane Boe of Coopers & Lybrand	December 29, 1975
(1)	Robert Tookey & Gil Kerns of Milliman and Robertson, Inc.	December 29, 1975
(20)	Wilburn Hippard of Coopers & Lybrand	December 30, 1975
(1)	Stuart Robertson of Milliman & Robertson, Inc.	December 31, 1975

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	Deponent	Date
(3)	Representatives of New York Securities, Inc. and its consultant accountant, Alexander Grant & Co.	January 2-16, 1976 (changed to January 5, 1976)
(4)	Harold Richards of Fidelity Corp.	January 2, 1976 Changed to March 29, 1976
(4)	Harold Richards of Fidelity Corp.	January 5, 1976 Changed to January 2, 1976
(3)	Javis J. Slade, Hamilton Robinson, Jr., Hans H. Sammer, Nelson Loud, Stanford Brainerd, Charles Smith, Max Schultze, Richard W. Smith, C. Severance, S. Mathes, L. Miralia, Mr. McKeekin of New York Securities, Inc.	January 5, 1976
(15)	Arnold Elkind	January 5, 1976
(12)	Hanover Square Associates	January 5, 1976
(16)	Oppenheimer Time Fund, Inc.	January 5, 1976 (Changed to January 13, 1976)
(3)	New York Stock Exchange, Inc. by Merle S. Wick	January 6, 1976 (per letter dated 12-17-75) (Carr appearing for NLM) Not going forward — to be noticed for some time in 2-76
(8)	Jerrold Fine of Steinhardt, Fine & Berkowitz	January 6-7, 1976 (per pls' notice dated 11/10/75)
(17)	Max Newmark	January 6, 1976
(16)	S. D. Cohn & Co.	January 6, 1976

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	Deponent	Date
(7)	William Wolbach of the Boston Group	January 7, 8, and 9, 1976 (per notice dated 12/23/75)
(15)	Martin Lipton	January 8, 1976 Taken by Trading Defendants
(17)	Harold Shepet	January 8, 1976 (Changed to 2-12-76)
(12)	Strand & Co.	January 8, 1976
(1)	L. Wm. Seidman of Seidman & Seidman	January 8, 1976 (Continued from 11/7/75) (Changed to 2/13 and 2/14/76)
(18)	Jerome Factor Individually and as Trustee	January 9, 1976
(19)	Ohio State Teacher's Retirement Board	January 12, 1976
(3)	Bernard Dishy, Stanley Easton, Elaine Berlin of Dishy, Easton & Co.	January 12-19, 1976 (Changed to January 14, 1976)
(16)	Oppenheimer Time Fund, Inc.	January 13, 1976 (Continued from January 5, 1976)
(6)	Donald Kramer	January 13, 1976 (Changed to 2-9-76)
(23)	Bernard Dishy, Stanley Easton, Elaine Berlin of Dishy Easton & Co.	January 14, 1976 (Continued from 1-12-76) (New change of place)
(1)	Herbert Glaser	January 15, 1976 (Continued from 12-22-75)
(7)	David Baker of the Boston Group	January 15 and 16, 1976 (per notice dated 12-23-75)
(3)	Representatives of Bache & Co. and its Consultant Accountant, Alexander Grant & Co.	January 19-30, 1976

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	Deponent	Date
(3)	Representatives of Bache & Co. by Robert Gallagher, Frederick Kelsey, Allan Freiman, Wallace Latour and Jack Ackerman, and its Consultant Accountant Alexander Grant & Co. by Charles Maurer, Edward McGowen, Sheldon Silver, David Stephens, Frank Greenberg, and Ben Taylor	January 19-30, 1976 (individuals designated by notice dated 12-29-75)
(7)	John W. Bristol of the Boston Group	January 21, 22, and 23, 1976 (per notice dated 2-23-75)
(7)	William Moore of the Boston Group	January 26, 27, and 28, 1976 (per notice dated 12-23-75)
(8)	Allen Gorrelick	January 26-28, 1976 (Continued from 12-8-75) Taken by Salomon Bros. (Carr attending for NLM)
(7)	Donald Evans of the Boston Group	January 29 and 30, 1976 (per notice dated 12-23-75)
(1)	Robert Spencer of Seidman & Seidman	February 2, 1976 Second Bite
(7)	Lee Smith	February 2 and 3, 1976 (per notice dated 12-23-75) Taken by Lawton Gen. Corp.
(1)	G. Philip Streetfield of Penn Life	February 3, 1976 Second Bite
(7)	William Brown	February 4, 1976 (per notice dated 12-23-75) Taken by Lawton Gen. Corp.
(7)	Daniel Fuss of the Boston Group	February 5 and 6, 1976 (per notice dated 12-23-75)

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	Deponent	Date
(7)	Thomas W. Courtney	February 9, 10 and 11, 1976 (per notice dated 12-23-75) Taken by Lawton Gen. Corp.
(6)	Donald Kramer	February 9, 1976 (Continued from 1-13-76)
(1)	Stanley Beyer of Penn Life	February 10, 1976 Second Bite
(1)	Daniel J. Disipio of Penn Life	February 10, 1976 Second Bite
(1)	Joe D. Bain of Penn Life	February 11, 1976 Second Bite
(17)	Harold Shepet	February 12, 1976 (Continued from 1-8-76)
(1)	L. Wm. Seidman of Seidman & Seidman	February 13 and 14, 1976 (Changed from 1-8-76)
(1)	Michael Balint of Haskins & Sells	February 24, 1976 Second Bite
(4)	Harold Richards (and other representatives) of Fidelity Corp.	March 29, 1976 (per order filed 12-22-75)
(1)	Burton Borman of Penn Life	May 11, 1976 Second Bite
(1)	Representatives of Wolfson, Weiner, Ratoff & Lapin, including the following individuals on a two-weeks-on, one-week-off basis: James Ash, Gene (or James) V. Ashjian, Fred Baum, Christopher Bennett, John Doe Kinsella, William Cory, Debbie Furlough, Robert Greer, Steven G. Arwezman, Donald Hedrick, Roy	February 2 — March 12, 1976

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Deponent	Date
Horn, Mike Hornstein, Terry Kleiman, Maurice Kushner, Neal Lewis, Morris Marvin Mesirow, Michael Mucciolo, Martin Paravado, Al Pasternack, Allen Payne, Ray Pratt, Carl Robertson, Leonard Sachs, Ray Standish, Art Stelmach, Blanche Terkelsen, Eloise Whiteside, Fred Baugh, Martin Kugler, Martin Livingston, Benjamin Pass, Richard Sommer, Frank West, Barry Binder, Murray Freund, Ray Park, William T. Tilley, Sigmund Watner, Christopher Bennett, Robert Reisner, Garry Hnatyshak, Barry Naiditch, Stephen Siff, Greta Houston	
(1) Representatives of Seidman & Seidman, including the following individuals on a two-weeks-on, one-week-off basis: Solomon Block, Julian Weiner, Phillip Wolfson, Al Finci, Frank West, Neal (or Neil) Lewis, Joseph De Armas, Richard Styvaert, Richard Seligman, Neill Freeman, Sydney Sawin (or Sawyn), Robert Reisner, Thomas O. McKee, Marshall Labow, George	March 15 — May 15, 1976

	Deponent	Date
	(Seidman & Seidman — cont'd) Kenas, Robert Chernock, James W. Ward, Richard Woldo, Steven Gryczman, Carter Omens, John Abernathy, James Dargavel, Fred Chazen, J. Rowley, Chaim Markheim, Raymond T. Irvine, Robert Grossman, Michael Eisenberg, Dave Oratov, and Robert Spencer	
(1)	Representatives of Haskins & Sells, including the following individuals on a two-weeks-on, one-week-off basis: Michael L. Balint, H. Clayton Chandler, William W. Gerecke, Kostas Gussis, Richard B. Hill, Raymond L. Horn, Charles F. Lemons, John C. McCormick, Paul W. Pinkerton, Bennett S. Robinson, Robert Van Arsdale, Robert E. White, Arthur F. Wilkins, James A. Wilson, Curtis E. Youngdahl, Bernard H. Berkman, George F. Kerhove, Leon H. McElvany, William W. McDonald, Albert J. Reznicek, Richard A. Schaab, Donald W.	May 17 — June 25, 1976

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	Deponent	Date
	Boyer, Thomas G. Clark, Philip A. Harmon, Mrs. Maryanne W. Rex, Richard B. Thomas, Gustave A. Reh, Jr., Del M. Jones, Kenneth M. Rosenberg, Joseph Backer, Sanford H. Bragg, Summar R. Wein, Dennis L. Fischel, Richard W. Johnson, William A. Mahan, Patriica L. Pyfrom (Smith), Samuel E. Wallace, Brian H. M. Wharton, Gary J. Steingrebe, and Robb Todd	
(1)	Defendants named as officers, directors and agents of EFCA and as EFCA fiduciaries in the first amended complaint and other representatives of EFCA or its subsidiaries	June 28 — August 2, 1976
(1)	Representatives of former accounting employers of Solomon Block (other than Wolfson, Weiner, Ratoff & Lapin and Seidman & Seidman)	May 17 — June 25, 1976
(6)	Representatives of Chemical Bank	May 17-24, 1976
(5)	Representatives of First National City Bank	May 17-24, 1976

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1 — 3700 Wilshire Boulevard, Suite 730, Los Angeles, deposition room — 384-9313 pls' counsel's office in same building, Suite 575, 380-4200

2 — Wilmer, Cutler & Pickering, 1666 K Street, N.W., Washington, D.C. 20006

3 — Kreindler & Kreindler, 99 Park Avenue, New York, N.Y. 10006

4 — Hirschler & Fleischer, Fourth and Main Streets, Richmond, Virginia 23219

5 — Bader & Bader, 270 Madison Avenue, New York, N.Y.

6 — Wolf, Popper, Ross, Wolf & Jones, 845 Third Avenue, New York, N.Y.

7 — Wachtell, Lipton, Rosen & Katz, 299 Park Avenue, New York, N.Y.

8 — Cleary, Gottlieb, Steen & Hamilton, One State Street Plaza, New York, N.Y. 10004, (212) 344-0600

9 — Coopers & Lybrand, 1251 Avenue of the Americas, New York, N.Y.

10 — Coopers & Lybrand, One Bush Street, San Francisco, Ca.

11 — White & Case, 14 Wall Street, New York, N.Y.

12 — Dewey, Ballantine, Bushby, Palmer & Wood, 140 Broadway, New York, N.Y.

13 — Curtis, Mallet, Prevost, Colt & Mosle, 100 Wall Street, New York, N.Y.

14 — Schmader, Harrison, Segal & Lewis, 1719 Packard Building, Philadelphia, Penn.

15 — Cadwalader, Wickersham & Taft, One Wall Street, New York, N.Y.

16 — Debevoise, Plimpton, Lyons & Gates, 299 Park Avenue, New York, N.Y.

17 — Milgrim, Thomajan & Jacobs, P.C., 25 Broadway, New York, N.Y.

18 — Arnstein, Gluck, Weitzerfeld & Minow, Sears Tower, Chicago, Illinois

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19 — Wright, Harlor, Morris & Arnold, Suite 900, Huntington Trust Bldg., 37 West Broad Street, Columbus, Ohio

20 — Palm Beach County Courthouse, 300 North Dixie Highway, West Palm Beach, Florida

21 — Gibson, Dunn & Crutcher, 515 South Flower Street, Los Angeles

22 — Federal Correctional Institute, Terminal Island, (At Warden's Conference Room or Women's Division) 831-8961

23 — Kimmelman, Sexter, Elovitch & Sobel, 25 Broadway, New York, N.Y. 10004

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IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1206.

JULIAN WEINER, et al.,

Petitioners,

v.

MALCOLM M. LUCAS, Judge of the United States District Court for the Central District of California, et al.,

Respondents.

BRIEF OF THE REAL PARTIES IN INTEREST IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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ALLEN D. BLACK,
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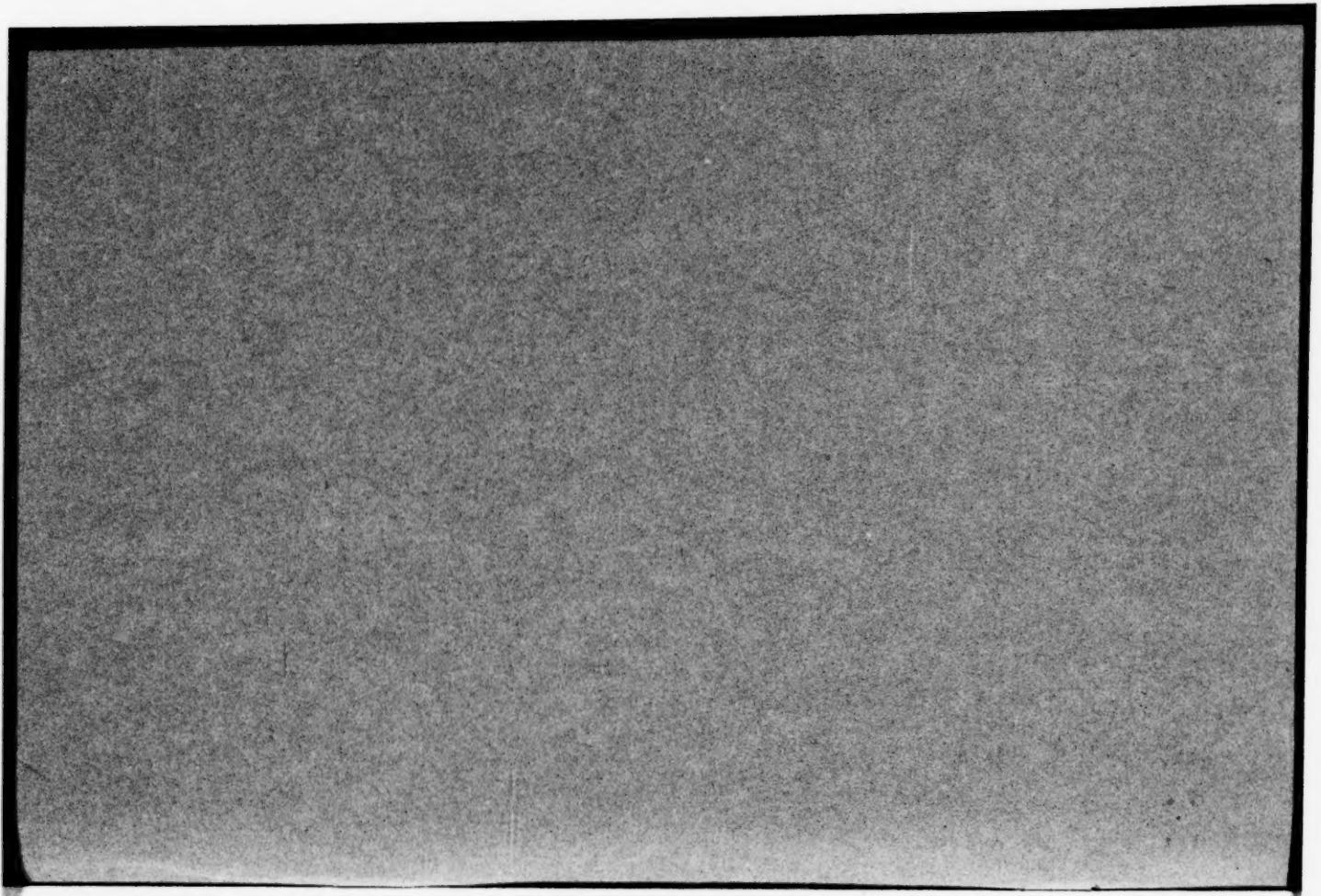

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IN THE

Supreme Court of the United States

—

OCTOBER TERM, 1975.

—

No. 75-1206.

—

JULIAN WEINER, ET AL.,

Petitioners,

v.

MALCOLM M. LUCAS, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, ET AL.,

Respondents.

—

BRIEF OF THE REAL PARTIES IN INTEREST IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

———

The Real Parties in Interest to these proceedings, plaintiffs in the multidistrict Equity Funding Corporation of America Securities Litigation (M. D. L. No. 142) now pending in the United States District Court for the Central District of California, respectfully oppose the petition for a writ of certiorari in the within matter.

A. JURISDICTION.

This Court lacks jurisdiction over the present petition under 28 U. S. C. § 1254(1) because none of the petitioners was a party to the proceedings in the Court of Appeals.

B. STATEMENT OF FACTS.

This petition stems from the *Equity Funding Corporation of America Securities Litigation*, which comprises more than a hundred cases, involving literally hundreds of plaintiffs and hundreds of defendants. The litigation has been pending since April, 1973, and was assigned to Judge Malcolm M. Lucas of the Central District of California by the Multi-District Panel, December 11, 1973. Discovery, including an estimated 200 depositions, has proceeded since November, 1974, under a carefully structured schedule which was designed by the Court to expedite, without prejudice to the rights of any party, what would surely otherwise be among the most protracted cases in judicial history. The District Court carefully and thoughtfully tailored Discovery Order No. 2 to accommodate the discovery needs of all the parties, and to serve the interests of justice by moving this complex litigation toward trial relatively expeditiously. Before entering Discovery Order No. 2, the District Court received briefs and heard oral argument from all parties who desired to be heard.

The statement of facts contained in the petition is unsupported by the record. Petitioners would have this Court believe that nearly every day dozens of separate depositions took place in many cities. In point of fact, the record in the Court below shows at most that for two days, November 24 and 25, 1975, three depositions took place simultaneously (all in Los Angeles). That situation lasted only briefly. At all times prior to November 24, 1975, no more than two depositions had gone forward simultaneously.[1]

1. Although events subsequent to November 25, 1975, when the Court of Appeals denied the petition for mandamus, are not part of the record below and hence are not properly before this Court, the fact is that only rarely have more than two depositions gone forward simultaneously.

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Petitioners seek to mislead the Court by failing to point out that many of the depositions of which they complain are (a) depositions of named plaintiffs being taken by defendants; and (b) depositions in the so-called "trading cases," in which petitioners have no interest whatsoever. See *In re Equity Funding Corp. of America Securities Litigation*, 375 F. Supp. 1378 (J. P. M. L. 1974).

The petitioners are simply incorrect in their statement that defendants are precluded from taking deposition discovery prior to August 2, 1976. Discovery Order No. 2 explicitly provides that all parties may take depositions during the entire discovery period. Indeed, certain defendants have already taken the depositions of a number of named plaintiffs. Moreover, Discovery Order No. 2 provides all defendants, including petitioners, the opportunity to conduct full examination of each witness, regardless by whom his deposition was originally noticed.

As an additional safeguard, Discovery Order No. 2 provides for an adjourned session of each deposition, to allow any party who was unable or who did not desire to attend the original session to question the witness after studying the transcript of the original deposition session.

The material included in the affidavits of Messrs. Markowitz and De Santis, appended to the petition, should be disregarded since it is not part of the record below.

C. ARGUMENT.

The petition should be denied for the following reasons:

1. There Is No Jurisdiction Over The Petition.

As pointed out above, this Court lacks jurisdiction over the petition under 28 U. S. C. § 1254(1) because none of the petitioners was a party to the proceedings from which the petition is taken.

2. The Petition Fails to State a Reason for Granting the Writ.

Rule 19 of this Court provides:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: . . .
>
> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

BLEED THROUGH

Petitioners have shown no conflict among the circuits, no conflict with the decisions of this Court, no important question of federal law that has not previously been decided by this Court, and certainly no shocking or egregious departure from the normal course of judicial proceedings.

To the contrary, petitioners bring to this Court only a most mundane question of discovery scheduling. It is a pity that this Court should be burdened with such a frivolous petition.

3. The Petition Is Without Merit.

Relying principally upon an 1890 decision of the Southern District of New York, petitioners ask this Court to prohibit absolutely the scheduling of two depositions simultaneously in any civil case, regardless of the circumstances. Alternatively, petitioners ask the Court to take upon itself the burden of reviewing the fairness of a discovery schedule that has been carefully and thoughtfully designed by a District Judge who is in constant daily touch with proceeding litigation. Neither this Court nor the Court of Appeals should be required to undertake such a burden.

The precise issue sought to be raised by the petition is whether the Court of Appeals properly denied a petition for mandamus [2] which sought interlocutory review of a discovery order of the District Court. The action of the Court of Appeals was plainly proper.

In *Will v. United States*, 389 U. S. 90, 95-96 (1967), this Court held:

> "The peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority

2. To which the present petitioners were not parties.

> when it is its duty to do so.' Roche v. Evaporated Milk Assn., 319 U. S. 21, 26 (1943). While the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction,' it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy. . . . [T]he party seeking mandamus has 'the burden of showing that its right to issuance of the writ is "clear and indisputable."' "

The burden is even more pronounced when mandamus is sought in a discovery setting. Thus, the Court of Appeals for the Ninth Circuit has stated that it:

> "has ever been reluctant to resort to the extraordinary writs as means for interlocutory review of discovery orders unless such orders disclose a prejudicial usurpation of authority not correctable on appeal." *Belfer v. Pence*, 435 F. 2d 121, 122-23 (9th Cir. 1970).

To satisfy that burden, petitioners would have to show that Judge Lucas acted beyond his power as a District Judge in managing discovery in this litigation. *Schlagenhauf v. Holder*, 379 U. S. 104 (1964). It is not enough to show simply that the District Court was wrong. *SEC v. Stewart*, 476 F. 2d 755 (2d Cir. 1973).

Petitioners have failed utterly to meet their burden. Indeed, there is no way petitioners could ever make the required demonstration, for the management of discovery proceedings and schedules is plainly within the *power* of the District Court.

Petitioners cite *Uhle v. Burnham*, 44 Fed. 729 (C. C. S. D. N. Y. 1890), and *Mims v. Central Mfrs. Mut. Ins. Co.*, 178 F. 2d 56 (5th Cir. 1949), for the proposition that simultaneous depositions are improper. *Uhle*, of course,

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antedates the Federal Rules of Civil Procedure by nearly 50 years, and reflects the outlook of an entirely different era. Both the law's receptivity to discovery and the means of transportation and communication have changed considerably in the last 86 years.

Mims was a simple case in which the Court found unreasonable the taking of 15 depositions on the same day. This case is far more complex than *Mims;* and the petitioners' complaint is of three, rather than 15, simultaneous depositions.

In any event, neither *Uhle* nor *Mims* held or even suggested that mandamus or other interlocutory review was proper to supervise a district court's management of discovery matters.

Petitioners have simply not shown that ordering simultaneous depositions is beyond the power of a trial judge and constitutes a clear abuse of discretion. Even if such a showing could be made in a garden variety suit, this Court must consider the peculiar circumstances of the subject litigation and its complex multidistrict character. See Section 1.10 of the *Manual for Complex Litigation* (1975).

Finally, the dilatory effect of interlocutory review of discovery scheduling, as urged by petitioners, was aptly pointed out by the Court of Appeals in *American Express Warehousing Limited v. TransAmerica Ins. Co.* (the "salad oil" fraud), 380 F. 2d 277, 284 (2d Cir. 1967):

> "Besides the obvious possibilities for abuse in the typical case if a court of appeals were to exercise intermittent supervisory power over discovery in the district courts, we feel that the nature of the present litigation presents another compelling reason for our discretionary refusal to entertain the petition. In a large and complicated lawsuit or series of lawsuits closely related, interlocutory review of such housekeeping matters as discovery would practically pre-

clude termination of the litigation by settlement or trial within the normal lifespan of any of the parties, attorneys or judges."

D. CONCLUSION.

For the foregoing reasons, the Court should deny the petition.

Dated: March 22, 1976.

Respectfully submitted,

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ALLEN D. BLACK,
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CERTIFICATE OF SERVICE.

I certify that this 22nd day of March, 1976, I caused three copies of the within Brief in Opposition to be served upon each of the petitioners, upon the nominal respondent, and upon the Solicitor General of the United States by United States mail addressed to petitioner's respective counsel, to the nominal respondent, and to the Solicitor General. In addition, I have sent courtesy copies of the Brief to all plaintiffs' and defendants' counsel in *Equity Funding Corp. of America Securities Litigation*, M. D. L. 142.

ALLEN D. BLACK,
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975.
No. 75-1206.

JULIAN WEINER, et al.,

Petitioners,

vs

MALCOLM M. LUCAS, Judge of the United States District Court for the Central District of California, et al.,

Respondents.

REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

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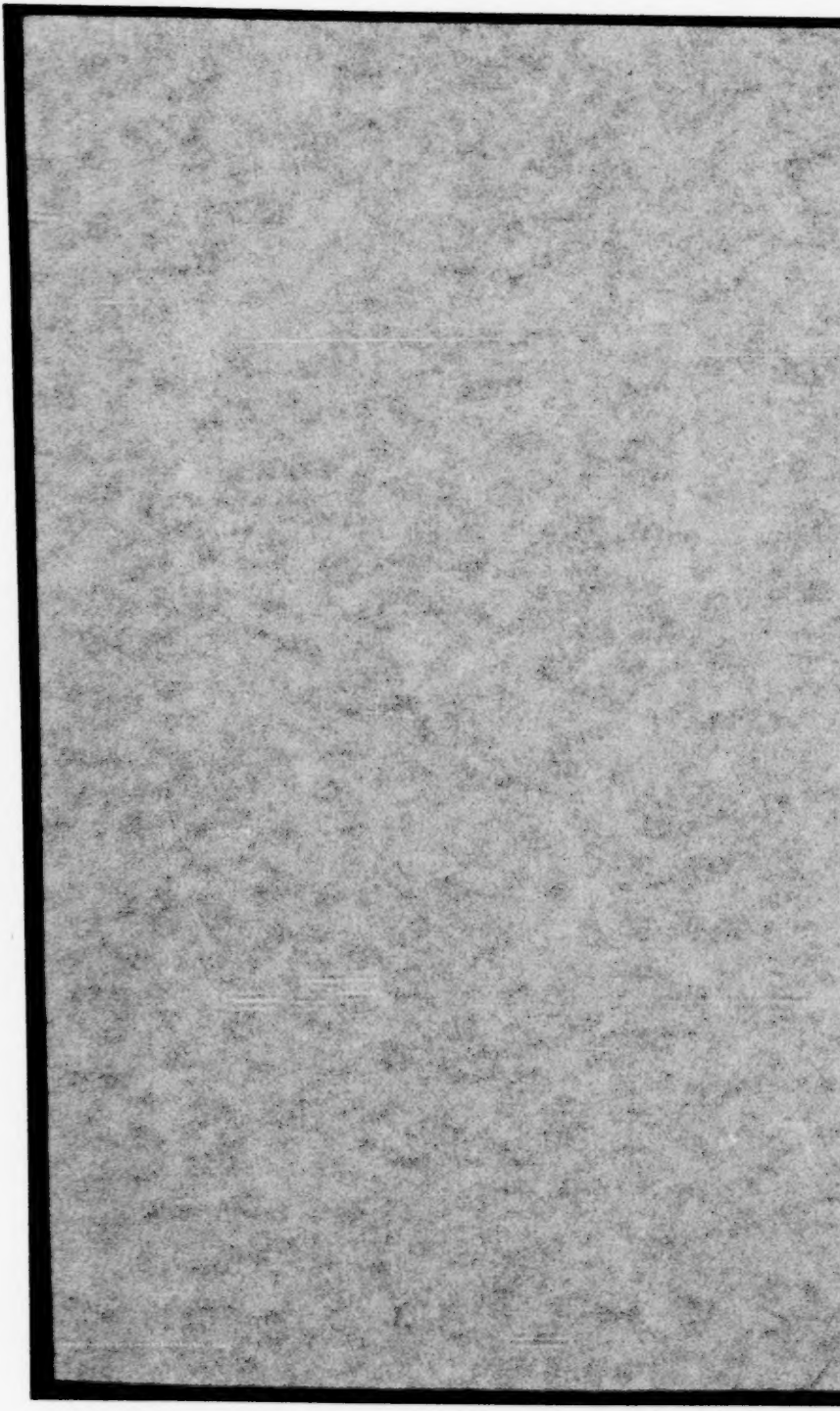

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975.
No. 75-1206.

JULIAN WEINER, ET AL.,

Petitioners,

vs.

MALCOLM M. LUCAS, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, ET AL.,

Respondents.

REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

Pursuant to Rule 24 of this Court, Petitioners Marvin A. Lichtig, Julian S.H. Weiner and Solomon Block file this Reply to Brief for Respondents in Opposition.

I. THE PETITIONERS DO NOT LACK JURISDICTION SINCE THEY WERE PARTIES TO THE PRIOR PROCEEDINGS.

The respondents incorrectly assert that this Court lacks jurisdiction

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because none of the petitioners were parties to the proceedings before the United States Court of Appeals for the Ninth Circuit (herein the "Court of Appeals"). On the contrary, court records of Docket No. 7535-71 contain a document filed and docketed in the Court of Appeals on November 25, 1975, which gave notice of the joinder therein of the named parties of this petition, Messrs. Lichtig, Weiner and Block.

It is a pity that the respondents have obfuscated the issues of this petition by asserting unsubstantiated allegations that are contradicted by a simple review of the appropriate court records.

II. THE PETITIONER IS IN COMPLIANCE WITH THE PROVISIONS OF RULE 19 OF THIS COURT.

The respondents contend that the petition does not present an issue within the parameters of Rule 19 of this Court but merely presents "a most mundane questions of discovery scheduling." 1 Such an assertion is unfounded

1. Discovery Order #2 in M.D.L. Docket No.142 requiring multiple simultaneous nationwide depositions, which have been cancelled or rescheduled without reasonable notice (see affidavit attached hereto) is a severely prejudicial abuse of discretion which can hardly be considered a "mundane question of discovery scheduling."

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because the petition presents two of the reasons set forth in Rule 19 as supportive of granting a review on writ of certiorari:

> "(b) Where a court of appeals has...decided an important question of federal law which has not been, but should be, settled by this court;...or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

A. The Discovery Order Constitutes A Significant Departure From The Accepted And Usual Course Of Judicial Proceedings.

The Discovery Order #2 in M.D.L. Docket No. 142 (herein the "Order") permitting simultaneous depositions, exceeds the discretion allowed by Rule 26 of the Federal Rules of Civil Procedure (herein the "Federal Rules"). More important, it frustrates the policy of fundamental due process promulgated by the Federal Rules. One of the purposes of Rule 26, was to avoid the "sterilization" which would result to a party if he were denied an equal and adequate opportunity to be heard.[2] The

2 See Caldwell-Clements, Inc. v. McGraw-Hill Pub. Co., 11 F.R.D. 156 (S.D.N.Y. 1951), discussed at pages 8 and 9 of the original petition.

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scheduling of simultaneous depositions has of necessity resulted in delays and lack of notice (see attached affidavit) and has made it nearly impossible for those firms with limited resources to provide their clients with effective assistance of counsel by attending the depositions.

For the above reasons, the order constitutes a significant departure from the "accepted and usual course of judicial proceedings" and certainly presents an issue worthy of this Court's consideration pursuant to Rule 19.

B. The Discovery Order Presents An Important Question Of Federal Law Not Yet Answered.

The issue is the extent to which a court may employ the Federal Rules to force a party to comply with this most burdensome Order.[3] Also, the limitations on the discretion of the court regarding the timing and number of depositions on a given day should be defined by this court to preclude any further abuses. Therefore, the petition presents "an important question of federal law which has not been, but should be, settled by this court."

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3 The original petition at pages 4,5 and "Appendix C", pp.1-5 details the prejudice and burden resulting to petitioners from the order.

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III. THE ORDER'S REQUIREMENT OF MULTIPLE SIMULTANEOUS DEPOSITIONS JUSTIFIES THE ISSUANCE OF A WRIT OF MANDAMUS.

A. The Order Constitutes An Improper Abuse Of Discretion Because It Deprives Petitioners Of Their Due Process Rights.

Discovery Order No. 2, specifies on page two, paragraph two, that the deposition schedule was promulgated under the authority of Rule 26(d) of the Federal Rules of Civil Procedure.

However, the court, in "allowing and requiring concurrent depositions" (emphasis added) exceeded the mandate of the above Rule 26(d). First of all, the essence of Rule 26(d) is that discovery may proceed in any manner as long as such discovery does "not operate to delay any other party's discovery." That mandate is critical in this case.

In addition, Rule 26(d) specifically allows the court, upon motion, to order a method or sequence of discovery "for the convenience of parties and witnesses and in the interests of justice." (emphasis added) Nowhere in Rule 26(d) is there to be found any implication that a court has the power to order concurrent, or, as in this case, simultaneous, depositions. Such an order in the present case certainly does not allow depositions to be taken "for the convenience" of any parties and witnesses

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except those represented by the larger law firms, which are able (both physically and financially) to attend simultaneous depositions.

There are well over one hundred nation-wide depositions scheduled under Discovery Order No. 2 in this case, and the plaintiffs in M.D.L. Docket No. 142, are represented by many times the number of attorneys and firms that are available to the defendants/petitioners.

As a result, the only conceivable avenue of relief available to the petitioners would be to retain, as co-counsel, a battery of attorneys accross the country to attend the scheduled depositions. Otherwise, petitioners will be deprived of their right to gather evidence and object to testimony, which relates directly to their ability to defend themselves. The court in this case has no right or power to force such an unfair decision upon the petitioners.

"A trial court has a duty, of special significance in lengthy and complex cases where the possibility of abuse is always present, to supervise and limit discovery to protect parties and witnesses from annoyance and excessive expense. Dolgow v. Anderson, 53 F.R.D. 661 (E.D.N.Y 1971) (emphasis added).

"'[T]he problem is to permit a litigant to obtain whatever information he may need to prepare adequately for the issues that may develop, without

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imposing an onerous burden of information gathering on his adversary'." Dolgow, supra, at page 664 (emphasis added).

Petitioners in this case cannot possibly afford to retain sufficient quantities of counsel to attend the ordered schedule of depositions. As a result, petitioners are being denied their right to gather vital information and make discovery objections in the preparation of their defense and are accordingly being denied their right to due process under the Fifth Amendment to the United States Constitution.

Of utmost importance in this case is the fact that petitioners are struggling to cope with a schedule of depositions which was forced upon them by court order; petitioners did not voluntarily burden themselves with such an impossible task. In Christhilf v. Annapolis Emergency Hospital Association, Inc., 496 F.2d 174 (4th Cir. 1974), the Court of Appeals specifically stated that

> "'The fundamental requisite of due process of law'...embraces an 'adequate opportunity...to defend...'." Christhilf, supra, at page 178, citing Louisville and Nashville R.R.Co. v. Schmidt, 177 U.S. 230, 236, 20 S.Ct. 620, 44 L.Ed. 747 (1900) (emphasis added).

Similarly in the case of S.S.Kresge Company v. N.L.R.B., 416 F.2d 1225 (6th Cir. 1969), the Court reiterated that

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> "It is an essential element of due process that an interested party be given...an opportunity to prepare a defense..." 416 F.2d at pages 1234, 1235 (emphasis added).

Petitioners' deprivation in this case derives not solely from the sheer quantity of depositions in this complex case, but, also from the inability of the available attorneys to attend the scheduled depositions (which are sometimes simultaneous) in the limited time span alloted by Discovery Order No. 2 (until October 1, 1976). If the court-ordered schedule is allowed to stand, petitioners will be substantially hindered in their attempts to defend themselves.

It is elementary that the right to due process includes the availability of a reasonable opportunity to learn of the claims of the opposing party and to be able to meet them with an adequately prepared defense. See, Gonzales v. United States, 348 U.S. 407, 75 S.Ct. 409, 99 L.Ed. 467 (1955); United States v. Cabbage, 430 F.2d 1037 (4th Cir. 1970).

As was succinctly stated in Cinema Amusements v. Loew's,Inc., 7 F.R.D. 318 (D. Delaware, 1947):

> "[D]iscovery has ultimate and necessary boundaries and... those boundaries are reached when they result in oppression of the opposite party." 7 F.R.D at page 320, citing Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1946).

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Further evidence that petitioners are being denied their due process rights is that the deposition schedule has resulted in depositions being taken without reasonable notice (see attached affidavit).

In paragraph 4 of the Order the District Court recognized that with such a burdensome deposition schedule, at least ten days notice would be required. However, this principle of fairness has in fact been contradicted by the practicalities of implementing the Order's discovery schedule. Numerous last minute changes in scheduling have occurred, all to the disruption of petitioners' ability to defend themselves (see attached affidavit).

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B. A Supervisory Writ of Mandamus Should Be Issued.

A discovery order that exceeds the limits of the court's proper discretion and results in substantial prejudice to the rights of the parties constitutes an abuse of discretion. Huff v. N.D. Cass Company of Alabama, 468 F.2d 172, 176 (5th Cir. 1972). In such event, a supervisory power of mandamus should be issued. In Heathman v. United States Dist. Ct. for Cent. Dist. of Cal. 503 F.2d 1032 (9th Cir.1974) the court noted, inter alia, that where a petition for writ of mandamus raises issues concerning scope of civil discovery, the resolution of which is necessary to prevent potential irreparable loss of petitioners' rights, the court must consider the merits of the petition.

Discovery is an area where courts have a wide amount of discretion. For that reason it is often necessary to supervise such orders. A writ of supervisory mandamus has been viewed as an appropriate means of review.

> "Discovery orders are virtually non-reviewable by ordinary process. Yet their impact on litigants is so severe that the courts have tolerated impermissible devices for securing review...To the extent that discovery practices present questions of law capable of general resolution,

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> supervisory mandamus would seem to be the ideal solution."
> 9 MOORE'S FEDERAL PRACTICE ¶ 110.28 (2nd Ed. 1975)(emphasis added)

A writ of mandamus has been issued under circumstances analogous to the instant case. In Colonial Times, Inc., v Gasch, (509 F.2d 517 (D.C.Cir.1975), the disputed order improperly interpreted the manner of taking depositions under Rule 30 (b)(4)to prohibit means other than stenography. Even though the order was only an error regarding the manner in which discovery depositions should proceed, it nevertheless was deemed an abuse of discretion worthy of the issuance of a writ of supervisory mandamus. In reversing the order, the court stated,

> "...The essential didactic and expository function of supervisory mandamus is thus best served in situations such as the one we face here...we find that mandamus lies in this case because the issue of discovery involved is one of first impression and is important to the administration of discovery. The error asserted concerns a misapprehension of the basic purpose of the discovery rule in issue-that is, the use of irrelevant

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factors in decision and a failure to consider certain relevant factors..." 509 F.2d at 525-526.[4]

The court went on to apply the standards established in Schlagenhauf v. Holden, 379 U.S.104 (1964)-- a case cited by respondents:

> "Schlagenahuf authorizes departure from the final judgment rule when the appellant court is convinced that resolution of an important, undecided issue will forestall future error in trial courts, eliminate uncertainty and add importantly to the efficient administration of justice." 509 F.2d at 524.

The principle of Schlagenhauf has been applied by other Circuits as well in the area of discovery. Atlass v. Miner, 265 F.2d 312 (7th Cir.1959) aff'd. 363 U.S.641, (1960). Securities and Exchange Commission v. Krentzman, 397 F.2d 55, 59 5th Cir.1968);

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[4] The court also distinguished a case cited by respondents, Will v. United States, 389 U.S. 90 (1967), noting that the holding of Schlagenhauf is not affected by Will. 509 F.2d at 524 Ftn.21

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In International Business Machines Corp. v. United States, 471 F.2d 507, 516 (2nd Cir. 1972) a discovery order denying the existence of a work-product privilege, was reversed.

> "Although as a general rule, ordinary discovery orders should not be appealable, occasionally there arises a discovery question presenting a question of law capable of general resolution; under such circumstances, appellate review by supervisory mandamus provides a logical method by which to supervise the administration of justice within the circuit." See also, Atlass v. Miner, supra, (concerning reversal of discovery order compelling testimony at a deposition.)

The present facts indicate that the issuance of a writ of mandamus is appropriate. As in Colonial Times Inc. v. Gasch, supra, the order in the present case misapprehends the basic purpose of the Federal Rule 26. The rule sought to provide all parties with an equal and adequate opportunity to be heard; the Order, on the other

hand, increases the likelihood that petitioners will not be able to attend simultaneous depositions and the defendants will be denied their rights to due process. The rule increases rather than eliminates uncertainty. The numerous unscheduled changes have increased the burden of attending the multiple simultaneous depositions. Such changes have occurred without notice (See attached affidavits).

The respondents are incorrect in claiming that the petitioners have no interest in the depositions of the trading defendants. On the contrary, the petitioners have already been named parties along with the trading defendants in Alfred University et. al. v. Wolfson Weiner Ratoff & Lapin, et.al. (S.D.N.Y. No.76-1081) The petitioners therefore have a direct interest in any testimony given by a co-defendant.

In, In re Equity Funding Corp. of America Securities Litigation, 375 F. Supp. 1378 (J.P.M.L. 1974),the decision which consolidated the cases in M.D.L. 142, the court acknowledged that the issues involved in the Equity Funding concerned all of the consolidated defendants.

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Finally, the Order fails to consider and accommodate those firms whose small size and limited resources make it virtually impossible to attend multiple simultaneous nationwide depositions.

Immediate review is necessary or the Petitioners will suffer irreparable injury.

The respondents argue that any interlocutory review would have a dilatory effect on the litigation. Any such risk is minimal in light of the possible prejudice petitioners will be forced to suffer.

> "Our practice has been to balance the policy underlying the final judgment rule against the claim in an individual case that justice and the effective administration of our courts demands immediate review. Securities and Exchange Commission v. Stewart, 476 F.2d 755, 765 (2nd Cir. 1973) (dissenting opinion of Justice Timbers).

In the case at bar, if review is not made at this juncture it would be difficult or nearly impossible to later review the prejudicial effect of such depositions after trial.

This is not a case involving the admissibility of a single deposition that could later be evaluated and appropriate action taken on appeal. The thrust of the petitioners' argument is that adequate preparation by a defense will be prejudiced by conduct occurring for more than one year. Once the right to effective discovery in accordance with Federal Rule 26 has slipped by, it will for all practical purposes be lost. cf. Swift & Co. Packers v. Compania Columbiana Del Caribe, 339 U.S. 684 (1950) (order vacating writ of attachment reversed where appellate review would be ineffective after release of security).

IV. CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Dated: April 1, 1976.

Respectfully submitted,

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AFFIDAVIT OF PAUL R. SALERNO

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, Paul R. Salerno, being first duly sworn, state the following:

1. I am an attorney duly admitted to practice before the United States District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit, and am an associate of the Law Offices of Richard A. DeSantis and am one of the counsel of record for Marvin A. Lichtig.

2. Stated below are the facts evidencing the oppression resulting to petitioners from the deposition schedule in M.D.L. Docket No. 142.

In the past five months, this law office has constantly received last minute notices of changes in the dates and locations of depositions. These persistent last minute notices make it extremely difficult for this law office to arrange for preparation concerning and attendance at said depositions.

3. On March 15, 1976, this law office received a notice that the deposition of Merle Wick, previously scheduled for Monday, March 15, at 10:00 a.m., had been rescheduled to Friday, March 12, at 10:00 a.m. The date of the notice was March 10, 1976. This office had an attorney available

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to attend the deposition in New York City, but it was impossible for us to arrange for said attorney to attend this deposition because this notice was received after the deposition had taken place.

4. On March 15, 1976, this law office received notice that the deposition of Jarvis J. Slade would commence on March 16, 1976, the deposition of Hamilton Robinson, Jr. would commence on March 16, 1976, and the deposition of Hans S. Sammer would commence on March 18, 1976.

5. On February 23, 1976, this law office received a notice that the deposition of Ray Pratt would commence on February 24, 1976, and that the deposition of Benjamin Pass would commence on March 1, 1976. Already scheduled for the 23rd and 24th of February were the depositions of Ray L. Horn and Edward Ermann, John Ryan, William Cory and William Blundell.

6. On February 23, 1976, this law office received notice that the deposition of William Blundell would commence on February 24, 1976.

7. On March 3, 1976, this law office received notice that the deposition of Philip DeFliese would commence on March 8, 1976.

8. On March 16, 1976, this law office received a notice that the deposition of Walter Reilly would commence on March 15, 1976.

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9. In addition to receiving late notice of depositions being taken, this law office has not been informed of depositions that had been noticed but were cancelled. On March 22, 1976, an attorney from this office appeared at plaintiff's steering committee headquarters to attend the deposition of Herbert Glaser and said attorney was told that this deposition had been cancelled. Our records indicate that no notice of this cancellation had been sent to this office. On March 29, 1976, one of our attorneys appeared at the noticed depositions of the Bache people scheduled in New York and was told that the depositions of the Bache people were not going to proceed. According to the records maintained in our office, we received no notice of the cancellation of these depositions.

10. According to the records maintained by this law office, the number and location of depositions in MDL Docket 142 for the past three months are the following:

Date	Number of Depositions	Location
1/5/76	5	New York
1/6/76	5	New York Los Angeles
1/7/76	4	New York Los Angeles

*Not listed are the dates when only one or two depositions were scheduled.

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Date	Number of Depositions	Location
1/8/76	4	New York
1/9/76	3	New York Chicago
1/13/76	3	New York Los Angeles
1/14/76	3	New York Los Angeles
1/15/76	4	New York Los Angeles
1/16/76	3	New York
1/21/76	3	New York
1/22/76	4	New York Los Angeles
1/23/76	4	New York
1/26/76	6	New York
1/27/76	5	New York
1/28/76	5	New York
1/29/76	4	New York
1/30/76	3	New York
2/2/76	3	Los Angeles New York
2/3/76	3	Los Angeles New York
2/5/76	4	Los Angeles New York
2/6/76	3	Los Angeles New York
2/9/76	6	New York Los Angeles Pittsburgh
2/10/76	7	Los Angeles New York Pittsburgh
2/11/76	8	New York Los Angeles Pittsburgh

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Date	Number of Depositions	Location
2/12/76	3	Los Angeles
2/13/76	3	Los Angeles New York
2/17/76	5	New York
2/18/76	5	New York Los Angeles
2/20/76	5	Atlanta New York
2/24/76	4	Los Angeles
2/25/76	4	Los Angeles
2/26/76	7	Los Angeles New York
2/27/76	6	Los Angeles New York
3/2/76	8	New York, Los Angeles and Atlanta
3/3/76	7	Los Angeles, Denver, New York Atlanta
3/4/76	9	New York, Los Angeles, Atlanta
3/5/76	6	New York, Los Angeles, Phoenix
3/8/76	6	Los Angeles, New York
3/9/76	5	New York, Los Angeles, San Francisco
3/10/76	6	New York, Los Angeles, San Francisco
3/11/76	3	New York, Phoenix Danville, Pa.
3/15/76	3	Los Angeles
3/16/76	3	Los Angeles Hartford, Conn.

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Date	Number of Depositions	Location
3/18/76	5	New York, Houston Los Angeles
3/19/76	5	New York, Waco, Texas, Los Angeles
3/22/76	5	New York, Los Angeles
3/29/76	4	Denver, Los Angeles, Richmond, Va.

Because of the numerous last minute changes made in the deposition schedule and the problems encountered by this office in receiving adequate notice of cancellations, our records may not reflect in total accuracy the number of depositions that were actually taken. However, taking notice of the depositions scheduled does reveal the burden imposed upon petitioners.

11. During the above referenced dates this law office employed, at most, five attorneys and the law office of Abeles & Markowitz employed at most, six attorneys. Because of these numbers, this law office and the law office of Abeles & Markowitz have had to allow certain depositions to take place without any attendance by counsel for petitioners.

12. Discovery Order #2 calls for the depositions to be taken until October, 1976. Petitioners expect that the above described burdens upon them will continue for at least that long.

Executed at Los Angeles,
California this 1st day of April, 1976.

PAUL R. SALERNO

Subscribed and Sworn
to before me this
1st day of April,
1976.

Notary Public in and
for said County
and State

BLEED THROUGH

CERTIFICATE OF SERVICE

I certify that this 1st day of April, 1976, I caused three copies of the within Reply Brief for Respondents In Opposition to be served upon each of the respondents named in the Brief In Opposition, upon the nominal respondent, and upon the Solicitor General of the United States by United States Mail addressed to said respondents' respective counsel, to the nominal respondent, and to the Solicitor General.

RICHARD A. DeSANTIS
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